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SEP 2 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: **CC Docket No. 96-45**

Dear Mr. Caton:

On behalf of EDS Corporation, enclosed for filing in the above-referenced proceeding you will find an original and 11 copies of the **Reply of EDS Corporation to Oppositions to Petitions for Reconsideration**. Please date stamp the "stamp and return" copy of the Reply for return by the messenger.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Randolph J. May

Enclosures

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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SEP 2 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

\_\_\_\_\_  
In the Matter of )

Federal-State Joint Board on )  
Universal Service )

CC Docket No. 96-45

**REPLY OF EDS CORPORATION TO OPPOSITIONS  
TO PETITIONS FOR RECONSIDERATION**

EDS Corporation ("EDS"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby files this reply to oppositions to the petitions for reconsideration of the Universal Service Report and Order<sup>1/</sup> submitted by the Information Technology Association of America ("ITAA") and the Ad Hoc Telecommunications Users Committee ("Ad Hoc")<sup>2/</sup>. ITAA has asked the Commission to reconsider its decision to require entities that provide interstate telecommunications services pursuant to private contracts to make payments to the universal service fund, and Ad Hoc has asked the Commission to reconsider its imposition of the universal service payment obligations on systems integrators. EDS is one of the member companies of the Ad Hoc Telecommunications Users Committee who participated in the filing of

<sup>1/</sup> Federal State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157, released May 8, 1997.

<sup>2/</sup> Petition for Reconsideration of the Information Technology Association of America, CC Docket No. 96-45, July 17, 1997; Petition of the Ad Hoc Telecommunications Users Committee for Partial Reconsideration and Clarification, CC Docket No. 96-45, July 17, 1997.

Ad Hoc's petition, and EDS also is a participating member of the ITAA. EDS supports the petitions for reconsideration filed by both Ad Hoc and ITAA and endorses the arguments contained therein.<sup>3/</sup> In light of the importance of the issues raised by the petitions, particularly the problem relating to the likely double payment of universal service contributions by EDS due to the way in which the Commission has determined universal service funds should be collected,<sup>4/</sup> EDS is filing this reply individually.

## **I. BACKGROUND**

EDS is one of the world's leading providers of information services, including systems integration.<sup>5/</sup> In this capacity, EDS purchases telecommunications services from common carriers for use in its systems integration business and then re-offers these telecommunications services as part of a package of services that may include some or all of the following: the provision of computer capabilities, remote data processing services, back-office data processing, management of customer relationships with carriers and equipment vendors, provision of equipment, and equipment maintenance. Of course, EDS uses some portion of the telecommunications services it purchases to meet its own internal communications needs, just as any large business would. EDS does not offer any telecommunications services on a common carrier basis. Rather, any telecommunications services it provides to others are offered on a private contractual basis.

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<sup>3/</sup> On August 18, 1997, IBM filed comments in support of Ad Hoc's reconsideration petition, and EDS generally endorses the arguments made by IBM in its comments.

<sup>4/</sup> See pages 6-8 infra.

<sup>5/</sup> See the Ad Hoc Petition, at 11, for the definition of a systems integrator.

Among other things, ITAA and Ad Hoc have demonstrated in their petitions that:

(1) the Commission exceeded its statutory authority by imposing universal service support obligations on private operators without making the required findings concerning whether significant bypass of the public switched network has occurred; (2) the decision is arbitrary because the costs to industry, the Commission, and the public of imposing support requirements on non-carriers will exceed the benefits of doing so; (3) the decision is arbitrary because it will require non-carriers, in effect, to make double payments into the universal service fund, thereby disadvantaging private operators vis-a-vis carriers, rather than promoting “competitive neutrality” as the Commission seems to think; and (4) the decision is arbitrary because, contrary to the Commission’s expressed intent, it will cause private operators to alter their business decisions concerning how they offer their services, or even whether they continue to do so. In their reconsideration petitions, ITAA and Ad Hoc explained in considerable detail why the Commission’s order should be reconsidered for the above-stated reasons.

ITAA suggested that, at a minimum, before imposing universal service obligations on private service operators, the Commission should issue a further notice of proposed rulemaking to obtain additional information, including specifically:

- Does the Commission have legal authority to require private service providers to make universal service payments in order to advance its goal of “competitive neutrality”?
- Has network bypass become so significant that it jeopardizes the ability of the Commission to adequately fund universal service?
- How much revenue would be generated by requiring private service providers to make universal service payments? To what extent would this reduce the contribution rate necessary to generate sufficient revenue to fund the universal service program?

- How much would it cost private service providers to establish the accounting mechanisms necessary to determine the amount of their universal service payments?
- How much would the inclusion of private service providers in the universal service payment mechanism increase the administrative cost of the program? Would the incremental cost exceed the revenue generated from private carriers?
- To what extent is the funding mechanism adopted for common carriers suitable for private service providers? Would application of this funding mechanism to private service providers be competitively neutral? Should a different payment mechanism be developed for private service providers?

As ITAA points out, because the Joint Board recommended that the Commission *not* impose universal service support payment obligations on non-carriers, commenters did not address these issues, and, therefore, the Commission lacked an adequate record upon which to base a reasoned decision concerning inclusion of private providers.

## II. **DISCUSSION**

EDS is aware of only a few parties that opposed the reconsideration petitions of the Ad Hoc Committee and ITAA,<sup>6/</sup> and these oppositions respond in a very cursory -- and unconvincing -- fashion to the substance of the arguments contained in those petitions. This failure to respond in a substantive fashion should be an indication to the Commission that the arguments raised by Ad Hoc and ITAA in their petitions are persuasive.

For example, USTA is content to recite that “universal service is a national public policy goal” and “[s]ince all providers benefit from the preservation and advancement of

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<sup>6/</sup> See the United States Telephone Association (“USTA”); AT&T Corp. (“AT&T”); MCI Telecommunications Corp. (“MCI”); and Bell Atlantic oppositions, all submitted on August 18, 1997.

ubiquitous public networks, all providers should contribute to universal service.”<sup>7/</sup> With regard to the double payment and competitive inequity problem detailed at great length by Ad Hoc, ITAA, and IBM, USTA says only that:

[M]ost telecommunications providers are able to pass through their contributions to their customers which allows them to avoid the burden of supporting universal service. Therefore, the Commission need not adopt any arbitrary reduction in the amount that a provider is required to contribute.<sup>8/</sup>

Likewise, AT&T argues that the Commission should exercise its permissive authority under Section 254(d) to prevent private service providers from “circumvent[ing] USF obligations by providing service to their largest business customers on a private carriage basis, thereby seriously eroding the foundation for universal service support.”<sup>9/</sup> Bell Atlantic also acknowledges the Commission has permissive authority to exempt non-carriers, but says to do so “will skew the competitive marketplace.”<sup>10/</sup> MCI merely states that “paging companies, private carriers, systems integrators, payphone providers, private satellite carriers, and non-profit agencies” all contend they should not be required to pay universal service support, but “[t]he Act, however, requires that all telecommunications carriers providing interstate telecommunications services contribute to the fund.”<sup>11/</sup>

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<sup>7/</sup> USTA, at 5.

<sup>8/</sup> Id.

<sup>9/</sup> AT&T, at 22.

<sup>10/</sup> Bell Atlantic, at 9.

<sup>11/</sup> MCI, at 17. It is clear, as even AT&T and Bell Atlantic acknowledge, that the Commission is not required as a matter of law to impose universal service support obligations on

EDS wishes to make clear that it supports the goal of universal service. And, as a major user of telecommunications services, which it acquires both for purposes of re-offering in conjunction with the provision of packaged services as a systems integrator and for its own internal purposes, EDS has in the past and will continue in the future to “contribute” to universal service support through the rates it pays the underlying carriers from whom it acquires telecommunications services. There is a significant “double payment” problem, however, created by the way in which the Commission has chosen to implement the universal service program, and the parties who oppose the ITAA and Ad Hoc petitions have avoided really addressing this problem.

With regard to the collection of universal service support payments, by adopting the “end user gross revenue approach” rather than the traditional “net revenue approach” typically applicable to similar situations in which surcharges, taxes, or regulatory fees are imposed on carriers, the Commission has placed private providers such as EDS in the position in which they almost certainly will end up contributing *more than* their equitable share of universal service support. Of course, at the same time that they are contributing *more than* their share of support, they are being placed at a competitive disadvantage vis-a-vis carriers because the carriers will be contributing *less than* their equitable share of support. As IBM explained, the double payment situation confronting systems integrators such as EDS likely occurs as a result of one of two (or both) conditions:

Typically, systems integrators are unable to differentiate which portion of services purchased from the underlying carrier will be used by the systems integrators internally or for enhanced services, and which portion will be resold to the integrators’ customers.

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non-carriers.

Therefore, under the R&O, the carrier may treat services, including those that will eventually be resold by systems integrators, as retail services and collect universal service contributions from the systems integrators. Under the R&O, systems integrators are also obliged to make universal service contributions on telecommunications that they resell (assuming that the systems integrators develop methods to accurately account for resold basic telecommunications within their systems integration revenues). The second condition causing double recovery will occur when long distance carriers account for revenues from systems integrators as wholesale, not retail, revenues, but do not adjust the rates charged to systems integrators to reflect the fact that the systems integrators will pay universal service contributions. The long distance carriers will hold systems integrators to long term service contracts which do not account for shifting universal service contribution obligations to systems integrators.<sup>12/</sup>

Thus, in effect, EDS likely will pay twice to support universal service. It will pay rates that include universal service support to carriers who already have included current and prospective universal service costs into the rates they charge to EDS, and it will make universal service contributions yet again based upon the retail revenues it receives from its end users. Apart from trying to assess the ultimate legal import for regulated carriers of the Commission's statement that it finds it would serve the public interest to allow carriers and providers to make changes to existing contracts to account for this new cost of doing business,<sup>13/</sup> it is unlikely as a matter of law that unregulated non-carriers such as EDS will be able unilaterally to revise their long-term contracts with their customers to recover universal service costs. And, in any event, concern about the impact on customer relations from altering customers' contractual expectations likely would preclude EDS from passing through universal service costs.

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<sup>12/</sup> IBM, at 6.

<sup>13/</sup> See Universal Service Order, at para. 851, and the discussion in the Ad Hoc Petition at pages 2-5.

On the other hand, the carriers will be unjustly enriched and competitively advantaged. The Commission not only has **not** required them to reduce the rates they charge EDS for telecommunication services which then will be resold by EDS, but it is quite possible that the carriers will claim that **all** of the services provided to EDS are exempt “wholesale” services, on the basis that they do not know precisely which portion of the services are to be resold.<sup>14/</sup>

In light of the almost certain inequities which are likely to result from the approach adopted by the Commission, it should reconsider its decision to impose the universal service support requirement on non-carriers. As demonstrated by Ad Hoc, ITAA, and IBM, the amount of any incremental revenue which may be collected from non-carriers is minuscule in relation to the carrier revenue which will be received,<sup>15/</sup> and this amount is certainly outweighed by the additional burdens and costs which will be imposed on the industry and the universal service administrator to collect this small amount of incremental revenue. Because the Commission is not mandatorily required to collect universal service support from non-carriers, it is an arbitrary exercise of the Commission’s permissive authority to do so in light of the problems which have now been delineated on the record.<sup>16/</sup>

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<sup>14/</sup> At the very least, the Commission should reconsider its decision to the extent that it will require the underlying carriers to reduce their rates by the amount of the universal service payment which would otherwise be due if the purchaser provides the carrier with a “resale certificate” attesting that a certain portion or all of the acquired communications will be resold subject to collection of the amount necessary to satisfy the purchaser’s universal service payment obligation. As the Commission is aware, this “resale certificate” mechanism commonly used in the industry to avoid double collection of similar obligations such as excise taxes.

<sup>15/</sup> See, e.g., IBM, at 12-13.

<sup>16/</sup> EDS reiterates that it agrees with ITAA that, prior to exercising its discretion under its permissive authority, Congress intended to make findings (which the Commission did not do)

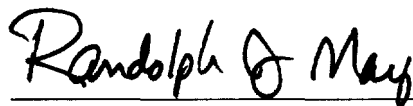
Finally, EDS wishes to urge the Commission to consider the reconsideration petitions expeditiously and sufficiently in advance of the time the first payment obligation becomes due, so that any parties that so desire will be in a position to seek judicial review, including possibly injunctive relief. Alternatively, if more time is necessary, the Commission should suspend the payment obligation pending its decision on the reconsideration petitions.

### **III. CONCLUSION**

For the foregoing reasons, EDS urges the Commission to grant the petitions for reconsideration submitted by ITAA and the Ad Hoc Telecommunications Users Committee relating to the imposition of universal service support requirements on systems integrators and non-carrier private providers.

Respectfully submitted,

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September 2, 1997

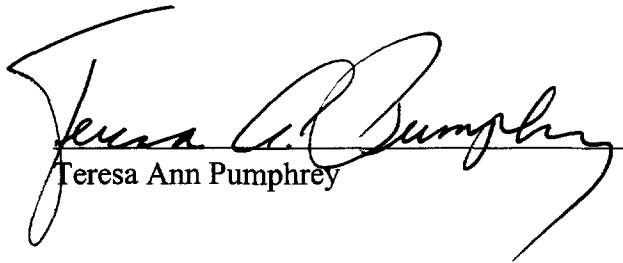
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concerning the level of public network bypass that exists. The reason for requiring such findings should now be clear: absent a level of private bypass which threatens the health of the universal service fund, the costs of including non-carriers clearly outweighs the benefits.

**CERTIFICATE OF SERVICE**

I, Teresa Ann Pumphrey, hereby certify that a copy of the foregoing **Reply of EDS Corporation to Oppositions to Petitions for Reconsideration**, was served by first-class mail, postage prepaid, this 2nd day of September, 1997, on the persons contained on the attached list.

  
Teresa Ann Pumphrey

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